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Supreme Court of the United States

October Term, 1970

No. 1249

CARLOS OVERTON,

Petitioner,

v.

RAYMOND C. RIEGER, Director of the Department of Probation of the County of Westchester,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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No.

CARLOS OVERTON,

Petitioner,

v.

RAYMOND C. RISCH, Director of the Department of Probation of the County of Westchester,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 28, 1970, rehearing denied on October 21, 1970.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York, denying a habeas corpus petition is reported at 311 F. Supp. 1022; it is set forth in the Appendix, infra at pp. 16-21. The order of the United States Court of Appeals for the Second Circuit, dismissing the appeal, is unreported and appears in the Appendix, infra at p. 14.

Jurisdiction

The judgment of the United States Court of Appeals was entered on September 28, 1970. A timely petition for rehearing filed on October 13, 1970 (October 12 being a court holiday), was denied on October 21, 1970. The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1254(1).

Questions Presented

1. Whether a public school official has authority under the Fourth Amendment to consent to a police search of a high school student's locked locker and of the student's coat inside.

2. Whether such consent, if constitutionally allowable, is valid when given in reliance upon a concededly defective search warrant.

3. Whether a search, instigated and directed by police officials possessing a defective warrant, is rendered lawful by the mere participation of a school official.

4. Whether delays in court procedures and the ambiguities of state law governing the duration of probation can combine to deprive the federal courts of jurisdiction over a habeas corpus petition seeking to void the direct and collateral consequences of a youthful offender conviction.

Statement of the Case

Carlos Overton's passage through the state and federal courts, seeking to vindicate his rights under the Fourth Amendment and vitiate an unconstitutional conviction, has been a long and difficult journey.

It began on December 21, 1964 when petitioner, a student at Mount Vernon High School, Mount Vernon, New York, stood watching as police detectives, acting pursuant to a subsequently vacated search warrant, searched his school locker and his jacket which was hanging inside (R. 77-80, 104, 120-121).[1] In the jacket they discovered four marijuana cigarettes (R. 104, 121).

The search of petitioner's jacket was the culmination of a series of events begun earlier that day. The detectives came to the school with a search warrant authorizing them to search the

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1. References are to the original state Record filed with this Court in connection with *Overton v. New York*, 393 U.S. 85, O.T. 1967, No. 212 and filed again in this case.

school lockers and the cars owned by the parents of petitioner and of one Cabell, as well as petitioner's person, his apartment, and the grounds of the Mount Vernon High School, where petitioner and Cabell were both students (R. 9-10). The police were authorized to search for marijuana believed to be unlawfully possessed by petitioner (R. 9). The police showed the warrant to Dr. Adolph Panitz, the vice-principal (R. 57), who then led them to petitioner and Cabell, who were in the school lunchroom (R. 46). The police directed petitioner and Cabell to come with them and took them to the vice-principal's office (R. 62-64). There, petitioner was told of the warrant and subjected to a search of his person, which yielded no evidence (R. 64, 66, 101, 115-7, 141-42). The detectives and Dr. Panitz then took petitioner to his school locker, assigned exclusively to him (R. 39, 77, 78, 92), where the search was made.

The vice-principal's motives for cooperating in the search are not clear. At one point he asserted that "if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker" (R. 93). But he also made it clear that he was acquiescing to the authority of the search warrant. When questioned concerning his taking the police to petitioner (R. 58), going to the locker (R. 75) and opening it (R. 78), the vice-principal replied that he was honoring the search warrant (R. 75). He also agreed that he "believed the search warrant was a valid and legal document" (R. 76).

Petitioner was charged with possession of marijuana. In a proceeding against Overton as a youthful offender, the Court of Special Sessions vacated the search warrant because the supporting affidavits contained no basis for believing there was any evidence in the school locker. Nevertheless the court denied the motion to suppress ruling that Dr. Panitz had "retained dominion over all the lockers which were assigned to individual students" and therefore the search was legal (R. 215-16). Thereafter, petitioner pleaded guilty to a youthful offender information. On June 8, 1965 he was sentenced to a term of indefinite probation (R. 228).

Petitioner perfected the appeal allowed by New York law. The Appellate Term, Second Department, reversed the conviction, holding that the "search was illegal and cannot be justified upon the theory of consent on the part of the vice-principal .... [d]efendant had the exclusive use of the locker in question and the purported consent to search it was not binding upon him." *People v. Overton*, 51 Misc. 2d 140, 273 N.Y. 2d 143 (1966); *App., infra*, p. 32.

The State appealed and a divided New York Court of Appeals reversed the Appellate Term and held that the vice-principal had the power, consistent with the Fourth Amendment, to consent to the search. *People v. Overton*, 20 N.Y. 2d 360, 229 N.E. 2d 596 (1967); *App., infra*, pp. 28-32. Judge Bergan, joined by Chief Judge Fuld, dissented on the ground that the vice-principal's consent to the search was in part compelled by the invalid search warrant, thus vitiating whatever supervisory power the school official may have otherwise had. *App., infra*, pp. 31-32. The matter was remanded to the Appellate Term which thereafter affirmed the petitioner's conviction without opinion.

A petition for certiorari was then filed with this Court. In a *per curiam* order, the petition was granted, the judgment of the Appellate Term was vacated, and the case was remanded "for further consideration in the light of *Bumper v. North Carolina*, 391 U.S. 543 (1968)." *Overton v. New York*, 393 U.S. 85 (1968); *App., infra*, p. 27.

On remand, the New York Court of Appeals, this time in a 4-3 decision, held *Bumper* to be distinguishable and reaffirmed petitioner's conviction. *People v. Overton*, 24 N.Y. 2d 522, 249 N.E. 2d 366 (1969); *App., infra*, pp. 22-27.

On September 12, 1969, petitioner sought a writ of habeas corpus in the United States District Court, for the Southern District of New York. The respondent's only jurisdictional contention was that the petitioner had been irrevocably discharged from probation following the Appellate Term's 1966 reversal of the conviction and therefore was not "in custody"

for the purposes of 28 U.S.C. section 2241. District Judge Cooper properly rejected the argument, holding that the petitioner was on probation and therefore in custody when he filed his habeas corpus application. *App., infra*, pp. 16-19. However, the district court went on to hold on the merits that the locker search was based on a voluntary and valid consent.

The petitioner perfected a timely appeal to the United States Court of Appeals, filed his brief, and the case was duly calendared for oral argument. The respondent's brief dealt solely with the question of custody, unveiling new arguments, which had not been tendered to the District Court, to support the alleged lack of jurisdiction. The petitioner submitted a reply brief discussing these new questions and moved to require a responsive brief on the merits; on August 17, 1970 that motion was granted. Instead of complying with the court's order, the respondent submitted a motion to dismiss the appeal, reiterating its jurisdictional arguments. That motion was set for a hearing on September 28, 1970. On that day, illness prevented the petitioner's then main attorney from attending at court. He informed the court, but not the undersigned co-counsel. As a consequence, the motion to dismiss was taken on submission and was granted on September 28, 1970, *App., infra*, p. 14; a timely petition for rehearing was filed on October 13, 1970 and denied on October 21, 1970. It is to review that decision that petitioner seeks a writ of certiorari.

Reasons for Granting the Writ

1. *The Court should determine whether and to what extent the Fourth Amendment protects the privacy of high school students.*

This Court has, of course, specifically held that high school students are protected by the guarantees of the First Amendment. *E.g., West Virginia v. Barnett*, 319 U.S. 624 (1943); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). It is also well settled that public school students are entitled to the protections of the due process

clause. See e.g., *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (5th Cir.), cert. denied 368 U.S. 930 (1961). This case affords the Court the opportunity to determine whether students "shed" their Fourth Amendment rights "at the schoolhouse gate". *Tinker v. Des Moines Independent Community School District*, supra at 506.

In three respects the decisions below violate well-established Fourth Amendment principles. Had a conceptually indistinguishable search been directed against an adult, the fruits would have been inadmissible in a criminal prosecution. Only on the premise that Fourth Amendment rights are "for adults alone," *In re Gault*, 387 U.S. 1, 13 (1967), could the admission of the evidence seized here be justified.

A. Fourth Amendment principles do not authorize school officials to consent to the search of a high school student's locker where the purpose of the search is to uncover evidence for a criminal prosecution. "For the Fourth Amendment protects people, not places. . . . [W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . . [W]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures". *Katz v. United States*, 389 U.S. 347, 351, 359 (1967). The touchstone of Fourth Amendment protection is the reasonable "expectation of privacy". *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Mancusi v. De Forte*, 392 U.S. 364 (1968). Such expectation has been found to be reasonable with regard to an office shared with others, *Mancusi v. De Forte*, *supra*, an apartment in which one is a guest, *Jones v. United States*, 362 U.S. 257 (1960), a hotel room, *Stoner v. California*, 376 U.S. 483 (1964), a subway station locker, *United States v. Small*, 297 F. Supp. 582 (D. Mass. 1969) and, finally, even a garbage can adjacent to one's house, *People v. Edwards*, ___ Cal. 2d ___, 458 P. 2d 713 (Calif. Sup. Ct. 1969). Surely a high school student's expectation of the privacy of his school locker should receive the same constitutional respect as a garbage can.

Moreover, petitioner's expectation of privacy was reasonable notwithstanding a school official's possession of the means

to open the locker and invade the privacy. A landlord may not validly consent to the search of his tenant's premises. *Chapman v. United States*, 365 U.S. 610 (1961). Nor may a hotel clerk consent to the search of a guest's room. *Stoner v. California*, supra. Most relevantly, the officials of a locker company may not authorize the warrantless search of a subway station locker:

> ...the contents of the locker were not "knowingly expose[d] to the public"..... [t]he locker itself may be viewed as "an area where, like a home...and unlike a field...a person has a constitutionally protected reasonable expectation of privacy..." *U.S. v. Small*, supra at 584 (citations omitted).

All of the incidents of privacy surrounded petitioner's use of his locker. Each student had the exclusive use of his locker during the school year, and the lockers could be locked, as petitioner's was (R. 77). Indeed, earlier in this litigation, the respondent conceded that a search of the locker without valid consent would have been illegal. Therefore, since the petitioner had a reasonable expectation of privacy with regard to his locker, the school official, like the landlord or the innkeeper, had no authority to consent to a police search which invaded that privacy.

Finally, even if the school authorities did have some authority to authorize a search of the locker, they had no right to search the petitioner's jacket hanging inside. The power to consent to a search of an area does not confer the authority to consent to a search of personal effects within that area. See *Reeves v. Warden*, 346 F. 2d 915 (4th Cir. 1965).

These principles make it clear that the petitioner's interests in his locker were such that the school authorities could not invade those interests on behalf of law enforcement officials. This Court should grant the writ and so hold.

B. Assuming *arguendo* that school officials may consent to a police search, that consent was induced by an invalid warrant and was not freely given. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

The record clearly showed that the police officers relied on the warrant and believed it gave them permission to search petitioner's locker (R. 123). Their opinion was shared by the vice-principal who agreed that he was "honoring the search warrant" when he took the police first to the petitioner and then to the petitioner's locker (R. 38, 75, 78). The case is squarely controlled by this Court's ruling in *Bumper*:

> [w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent. 391 U.S. at 550.

Following this Court's remand, a majority of the New York Court of Appeals attempted to distinguish *Bumper*. Their reasoning was that once the school officials were made aware of the possible violation of school rules, they have a duty to exercise their right to search in order to advance administrative purposes. But, when police officials brandish a warrant and seize evidence for criminal prosecution of the student, that search must be judged by normal Fourth Amendment standards. Viewed in that light, the warrant had a coercive impact on the vice-principal and vitiated his consent to a police search, assuming he even had the authority to give such consent. As Judge Bergan noted in dissent:

> . . . if the bad search warrant played an effective role in the invasion of defendant's privacy, the result is unlawful even though the vice-principal also gave his "consent" to the search and had a general authority in the school premises. 24 N.Y. 2d at 527. *App., infra*, at p. 26.

C. The search was primarily a police search and its illegality cannot be remedied by the school official's involvement.

Finally, even assuming that the vice-principal had the authority to consent to the police search, and did validly consent, the search still violated established Fourth Amendment prin-

ciples. It is well settled that "a search is a search by a federal official if he had a hand in it." Lustig v. *United States*, 338 U.S. 74, 78 (1949). This principle has been applied in a variety of situations to invalidate searches where police officials were involved. For example, in *Corngold v. United States*, 367 F. 2d 1, (9th Cir. 1966) the Ninth Circuit held that a search conducted by an airline employee "joined actively" by customs officials was a police search. In *Smith v. Rhay*, 419 F. 2d 160 (9th Cir. 1969), it was held that where a parole officer searched a parolee's room pursuant to a police request, the search must be judged by normal Fourth Amendment standards, not by the less rigorous standards applicable to parole searches. Finally, the Seventh Circuit has held that evidence seized by a private individual, in a search neither participated in, instigated by, nor known to the police should be excluded when knowingly used by the government in a potentially criminal action. *Knoll Associates, Inc. v. FTC*, 397 F. 2d 530 (7th Cir. 1968); compare *NLRB v. South Bay Daily Breeze*, 415 F. 2d 360 (9th Cir. 1969); *cert. denied*, 397 U.S. 915 (1970).

A fortiori where, as here, a search is instigated by police officials, participated in by police officials, and of profit to police officials, it is a police search notwithstanding the role of the school official. If a police search fails under those Fourth Amendment standards applicable to police officers, as this search concededly does, it cannot be resurrected by a school official's participation. The courts below, in upholding the search, have sanctioned a new form of the "silver platter" doctrine interred in *Elkins v. United States*, 364 U.S. 206 (1960). In so doing, the decision below is in conflict with the rule in the Seventh and Ninth Circuits.

2. *This case raises important questions concerning the availability of federal habeas corpus.*

The order of the court below, dismissing the appeal, does not illuminate the basis of the determination. But implicit in the dismissal are two important questions concerning the availability of federal habeas corpus: (1) whether ambiguous provisions of state law can serve as the basis for finding a petitioner

no longer "in custody" and (2) whether, assuming *arguendo* that such finding is correct, habeas corpus relief must nevertheless be available.

A. Petitioner was on probation when he filed his habeas corpus application.

It is, of course, undisputed that if the petitioner was on probation when he filed his habeas corpus application, he was "in custody" within the meaning of 28 U.S.C. §2241. *Jones v. Cunningham*, 371 U.S. 236 (1963). In the District Court, the respondent's sole jurisdictional objection was premised on a docket notation that petitioner had been "released" in 1966, following the Appellate Term's reversal of the conviction. The District Court properly rejected the argument as totally inconsistent with New York's statutory arrangement governing the rights of defendants who prevail on appeal. *App., infra*, pp. 16-19.

In the Court of Appeals, the respondent unveiled new objections based on infrequently-interpreted or now-repealed statutory provisions. First, it was argued that the case was moot because petitioner suffered no disabilities or burdens flowing from the youthful offender adjudication. Reliance was placed on §913n of the New York Code of Criminal Procedure.[2] But this Court has made it clear that mootness exists only when there is no possibility that adverse collateral consequences will flow from a criminal adjudication. *See, Sibron v. New York*, 392 U.S. 40, 50-58 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Ginsberg v. New York*, 390 U.S. 629 (1968). Accordingly, lower federal courts have found that a variety of fairly slight consequences will prevent a case from becoming moot. *E.g., United States v. Cowan*, 396 F. 2d 83 (2d Cir. 1968); *Esteban v. Central Missouri State College*, 415 F. 2d 1077 (8th Cir. 1969);

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2. "No determination made under the provisions of this title shall operate as a disqualification of any youth subsequently to hold public office, public employment, or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no youth shall be denominated a criminal by reason of such determination, nor shall such determination be deemed a conviction."

cert. denied, 398 U.S. 965 (1970); *Grey v. United States*, 417 F. 2d 539 (D.C. Cir. 1969); *Kemplen v. State of Maryland*, 428 F. 2d 169 (4th Cir. 1970); *United States v. Flanagan*, 305 F. Supp. 325 (E.D. Va. 1969); *Scott v. District Attorney, Jefferson Parish*, 309 F. Supp. 833 (E.D. La. 1970). Indeed, even the New York courts have held, §913n notwithstanding, that a youthful offender adjudication can be deemed a criminal conviction for some purposes. See *People v. Shannon*, 1 A.D. 2d 226; *aff'd* 2 N.Y. 2d 792 (1956). These decisions all indicate that the continuing consequences of the adjudication prevent the case from being moot.

Next, the respondent contended that under New York law petitioner's sentence of indefinite probation was for a maximum of three years unless the court extended the period to five years.[3] Section 913m, which was repealed in 1967, had not been construed by the New York courts on this issue. It is arguable that the section afforded the trial judge the discretion to impose a five-year probation at the time of the initial sentence. But even if one treats petitioner's original sentence as three years, it was suspended from May 20, 1966 (when the conviction was reversed by the Appellate Term) until July 7, 1967 (when it was reinstated by the New York Court of Appeals). Its running was also arguably suspended from October 28, 1968, when this Court vacated the State Court judgment, until April 23, 1969 when the New York Court of Appeals reaffirmed the conviction. In that event, even a three-year term of probation would still have been in effect when the habeas corpus petition was filed.

Finally, to resist this argument, the respondent maintained that in no event could the period of probation extend beyond petitioner's minority which ended on his twenty-first birthday in October, 1968, a year before the petition was filed in the

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3. Section 913m, New York Code of Criminal Procedure, provided: "...the defendant may be placed on probation for a period not to exceed three years, provided, however, that the court in its discretion may from time to time, while such probation is in force, extend such probation for a period not to exceed five years, including the original probationary period."

District Court. Once again, a now-repealed statute was relied upon.[4] And again it is questionable that such a general probation provision would control the more specific youthful offender provisions contained in section 913m. However, since the youthful offender provisions covered persons from sixteen to twenty-one, if the limitation of section 933 applied to those provisions probationary sentences of up to five years would be impossible. Such a strained and contradictory reading of state law makes little sense.

Indeed all of the respondent's statutory arguments were similarly strained. In fact, the applicable provisions are as susceptible to a finding that petitioner was on probation in September 1969 as they are with the contrary conclusion. Where the issue is the availability of federal District Court relief, such ambiguities must be resolved in the petitioner's favor.

B. Even if petitioner was not technically "in custody" in September 1969, the broad purposes of the Great Writ require that he be allowed a federal forum to contest his conviction.

The dynamic nature of the remedy of habeas corpus has been noted by this Court on numerous occasions. See, e.g., *Fay v. Noia*, 372 U.S. 391 (1963). There are three reasons why this petitioner is entitled to invoke the writ's broad mandate.

First, this is the final episode of, in effect, a single organic lawsuit which commenced six years ago when the vice-principal placed his hand in petitioner's jacket pocket. Since that moment, petitioner has diligently pursued his constitutional claim through the state and federal courts, including a successful, though short-lived vindication from this Court. "His path has been long—partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies. He should not be thwarted now. . . ." *Carafas v. La Vallee*, *supra* at 240. Like *Carafas*, the petitioner is entitled to have a federal court pass upon his Fourth Amendment claims.

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4. New York Code of Criminal Procedure Section 933: "The period of probation may not in the case of a child extend beyond his minority . . ."

Second, the case reflects the "low visibility" aspects of the criminal process which the Court has indicated cannot be insulated from federal scrutiny. See, *Sibron v. New York*, supra at 52-53. New appreciation for the availability of habeas corpus must be formulated so that state defendants whose publicly short sentences will expire before state remedies can be exhausted will not be denied a federal forum.

Finally, in a very real sense, the petitioner will be "in custody" of this conviction for the rest of his life. It will haunt him whenever he is asked about his personal history, the kind of inquiry which, unhappily, is made with increasing frequency in our society. Before petitioner is remitted to a lifetime of bearing the stigma of a youthful offender adjudication, this Court should at least decide whether that conviction was obtained in conformity with the Constitution.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1971

APPENDIX

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of September, one thousand nine hundred and seventy.

CARLOS OVERTON,

Petitioner-Appellant,

v.

RAYMOND C. RIEGER, Director of the Department of Probation of the County of Westchester,

Respondent-Appellee.

It is hereby ordered that upon consideration of the motion made herein by counsel for the appellee by notice of motion dated September 17, 1970 to dismiss the appeal from the United States District Court for the Southern District of New York for mootness or in the alternative to remand the action to the District Court with a direction to dismiss for lack of jurisdiction that the appeal be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

BEFORE:

HON. JOHN A. DANAHER

HON. HENRY J. FRIENDLY

HON. PAUL R. HAYS

Circuit Judges

UNITED STATES COURT OF APPEALS

Second Circuit

CARLOS OVERTON,

Petitioner-Appellant,

v.

RAYMOND C. RIEGER, Director of the Department of Probation of the County of Westchester,

Respondent-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is Ordered that said petition be and it hereby is denied.

JOHN A. DANAHER

HENRY J. FRIENDLY

PAUL R. HAYS

UNITED STATES DISTRICT COURT

Southern District of New York

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69 Civ. 4006

MEMORANDUM

CARLOS OVERTON,

Petitioner,

– against –

RAYMOND C. RIEGER, Director of the Department of Probation of the County of Westchester,

Respondent.

IRVING BEN COOPER, D.J.

Petitioner seeks a writ of habeas corpus alleging that he was adjudicated a Youthful Offender by the Court of Special Sessions of the City of Mount Vernon, New York, on June 8, 1965 and sentenced to indefinite probation up to five years at the discretion of the court.

The gravamen of the petition is that the evidence against him was illegally seized from his school locker opened for police by the school's vice-principal after the latter had been informed by police that it was suspected of containing marijuana and after they showed him a search warrant later found and now conceded to have been invalid.

The first issue is whether petitioner is "in custody" satisfying the jurisdictional requirement of 28 U.S.C. § 2241

et seq. In *Jones v. Cunningham*, 371 U.S. 236 (1963) the United States Supreme Court Established that physical restraint is not required and that a prisoner on parole is in custody for federal habeas corpus purposes. Our circuit has held that a probationer is similarly in custody. See *United States v. Re*, 372 F.2d 641 (2d Cir.), cert. denied, 388 U.S. 912 (1967). See also, *United States v. Washington*, 341 F.2d 277, 280 (3rd Cir. 1965). While the precise status of petitioner is confused, we believe he is in custody so as to entitle him to maintain an application for federal habeas corpus.

The history of this case follows. After having been adjudicated a youthful offender and placed on indefinite probation for up to five years by the Court of Special Sessions of the City of Mount Vernon on May 31, 1966, he was discharged from probation by order of the court on May 31, 1966 following reversal of its determination that the evidence against him was not seized illegally, and dismissal of the information, by the Supreme Court, Appellate Term, Second Department (51 Misc. 2d 140 (1966)).

In 1967 the New York Court of Appeals held that notwithstanding the invalid search warrant, the search could be sustained without a warrant because of consent by the school vice-principal, and reversed the Appellate Term. See *People v. Overton*, 20 N.Y. 2d 360. On remand, the Appellate Term affirmed petitioner's conviction without opinion. Thereafter, on petition for certiorari, the United States Supreme Court vacated this second judgment of the Appellate Term and remanded the case for further consideration in light of *Bumper v. North Carolina*, 391 U.S. 543 (1968). See *Overton v. New York*, 393 U.S. 85 (1968).

The New York Court of Appeals thereupon ordered reargument and upon reconsideration adhered to its prior determination. See *People v. Overton*, 24 N.Y. 2d 522 (1969). The June 21, 1969 remittitur of the Court of Appeals to the Court of Special Sessions ordered that court to proceed according to this final determination upholding petitioner's conviction.

We believe it clear from the May 31, 1966 order discharging petitioner from probation[1] that this was an interim discharge from custody pending appeal and following reversal of his conviction and dismissal of the information pursuant to the New York Code of Criminal Procedure §§545, 526 and 767, and was not intended to be a final and irrevocable discharge. It was precipitated by the Appellate Term reversal in the absence of which defendant in all likelihood would have been held accountable under the probation order. Accordingly, petitioner's original judgment and sentence was reinstated pursuant to New York Code of Criminal Procedure §546 by virtue of the final determination by the New York Court of Appeals affirming his conviction.

Petitioner's return to probationary status should not be viewed as conditional upon a subsequent order explicitly vacating the May 31, 1966 discharge. The above-described remittitur from the New York Court of Appeals is the law of the case. If ordered to report by the probation office he would have no recourse but to comply, failing which could result in the revocation of his probation and commitment. Additionally, when placed on probation the terms and conditions thereof were set forth and established. Petitioner is again subject to these restraints.

In opposition it is argued that petitioner's discharge has at all times been considered final and irrevocable by the Probation Department. Since May 31, 1966, he has not been required to report to the probation department or account for his actions or whereabouts or restricted in any manner whatsoever. See Affidavits of James J. Duggan, October 6, 1969 and November 3, 1969. As we see it, however, the inaction of the Probation Department since the June, 1969 remittitur from the Court of Appeals, based on what we

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1. The handwritten notation by Judge John P. Griffith reads: 5/31/66. Appellate Term reversed and information dismissed on 5/20/66. Def. discharged."

believe to be an erroneous interpretation of the initial order of discharge, cannot be determinative of the question of custody.[2]

Probationary restrictions and the threat of incarceration for violation thereof suffice to constitute "custody" for purposes of federal habeas corpus. See *Jones v. Cunningham*, supra at 242; *United States v. Washington*, supra; *United States v. Re*, supra; "Developments in the Law—Federal Habeas Corpus," 83 Harv. L. Rev. 1038, 1072-79 (1970). Petitioner meets this criteria and is in custody.[3]

We are confronted therefore with the merits of his claim that *Bumper v. North Carolina*, supra is dispositive and renders his adjudication as a youthful offender invalid. Preliminarily, the power of the vice-principal to consent to the search follows from the affirmative obligations of school authorities to supervise the children entrusted to their care and the consequent retention of control by them over the lockers. See *People v. Overton*, 20 N.Y. 2d 360, 363 (1967). Similarly, the analogy to *Bumper* fails by virtue of this duty of supervision. "Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there." *Id.*

The Court of Appeals held that the trial judge after a hearing denied the motion to suppress on the ground "that the vice-principal had consented to the search and that he had a right to do so." *Id* at 361. Addressing the question of

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2. The relative strictness or inaction of a petitioner's particular probation officer should not be a factor in determining whether such petitioner may maintain his federal habeas corpus application.

3. The fact that petitioner's probationary period of up to five years imposed on June 8, 1965 expires in a few months, of course does not affect his standing to maintain this application. It is even questionable whether a release now after the initiation of this action would render his suit moot. See *Carafas v. LaVallee*, 391 U.S. 234 (1968). However, as a youthful offender the continuing disabilities might not suffice to give him a substantial stake in the judgment of conviction which survives the satisfaction of his sentence. *Id.*

whether the consent was freely given or under compulsion of the invalid search warrant the Court held:

> "... Dr. Panitz [the vice-principal] testified that: 'Being responsible for the order, assignment, and maintenance of the physical facilities, if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker.' (italics supplied.)
>
> This testimony demonstrates beyond doubt that Dr. Panitz would have consented as he did regardless of the presence of the invalid search warrant." *Id.* at 362.

On reargument to consider the effect of *Bumper*, the Court of Appeals reaffirmed its earlier position and held that there was no "lawful coercion" here:

> "As the designated representative of the people of Mount Vernon, Dr. Panitz opened the locker, which was certainly not the private property of the defendant, in fulfillment of the trust and responsibility given him by the city residents through the Board of Education. Coercion is absent in this setting, having been displaced by the performance of a delegated duty.... Contrasting the facts in this case with those in *Bumper*, it does not require extensive analysis to conclude that the 'situation instinct with coercion' which characterized the plight of Bumper's 66-year old grandmother can not be discerned where we find a public official performing a delegated duty by permitting an inspection of public property." 24 N.Y. 2d at 526.

We conclude that the appropriate constitutional standard was applied and that the factual determination that the vice-principal's consent to the search was voluntary and not induced by the invalid search warrant is in fact fairly supported by the record. See 28 U.S.C. § 2254(d). The vice-principal's affirmative response when asked if he were "honoring the search warrant" is not inconsistent with and does not undercut his statement that whenever in the course of his

duties he received a report of the likelihood of the existence of an item of illegal nature in a locker assigned a student, he would undertake to inspect it.

Accordingly, the application for a writ of habeas corpus is denied.

SO ORDERED:

New York, N.Y.
April 6, 1970

s/IRVING BEN COOPER

UNITED STATES DISTRICT JUDGE

People v. Overton, 24 N.Y. 2d 522, 249 N.E. 2d 366, 301 N.Y.S. 2d 479 (1969)

BURKE, JUDGE

We ordered reargument in this case so that we might reconsider our initial determination (20 N.Y. 2d 360, 283 N.Y.S. 2d 22, 229 N.E. 2d 596) in light of the recent Supreme Court decision in Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797. The single issue before us is whether the search that was conducted in this case may be sustained without a warrant.

The facts, critical to our determination, are quite simple. Three detectives of the Mount Vernon Police Department had obtained a warrant directing the search, *inter alia*, of two high school students and their lockers at the Mount Vernon High School. The detectives presented the warrant to Dr. Adolph Panitz, the vice-principal of the school, who summoned the two students to his office. The detectives searched the boys and found nothing. After a brief interrogation, two of the detectives took one youth to his locker, leaving the defendant in the presence of the vice-principal and the remaining detective. At this time, the defendant was asked if he had marijuana in his locker. The youth did not answer, but merely nodded in an uncertain manner. The detective persisted, so that the youth replied either "I guess so" or "Maybe". The detective, Dr. Panitz, the school custodian and the defendant then went to the latter's locker. Dr. Panitz opened the locker with his master key and the detective found marijuana cigarettes in the defendant's jacket.

Subsequently, it was held that the warrant was ineffective insofar as the search of the locker was concerned. The defendant then moved to suppress the use of the cigarettes as evidence in a youthful offender proceeding. The Trial Judge denied the motion, stating in part that "The Board of Education, through Dr. Panitz, retained dominion over the use of the lockers and the Court finds that the search was legal." The Appellate Term disagreed, stating in a *Per Curiam* opinion that "The search was illegal and cannot be justified upon the

theory of consent on the part of the vice-principal of said school" (51 Misc. 2d 140, 273 N.Y.S. 2d 143). In our initial determination, we reversed the Appellate Term and sustained the denial of the motion to suppress. Judge Keating, writing for a majority of the court, concluded that Dr. Panitz consented to the search and that such consent was binding upon defendant. In his opinion, he pointed out that the locker searched was assigned to defendant Overton at the beginning of the school year. He was given a combination lock, but was required to disclose the combination to his official teacher. In addition, both Dr. Panitz and the school custodian possessed a master key to all lockers in the school. Also, regulations governed the use of this facility so that each student had exclusive possession of the locker only vis-a-vis other students. In summarizing the supervisory position retained by the school, Judge Keating observed, "Not only have the school authorities a right to inspect but *this right becomes a duty when suspicion arises* that something of an illegal nature may be secreted there. When Dr. Panitz learned of the detectives' suspicion, *he was obligated to inspect the locker.* This interest, together with the nonexclusive nature of the locker, empowered him to consent to the search by the officers." (20 N.Y. 2d, p. 363, 283 N.Y.S. 2d, p. 25, 229 N.E. 2d, p. 598, emphasis supplied.) The dissenters argued that "the principal opened the door, not because he was exercising a free supervisory control over the locker in the interest of the school program, but because he felt the invalid warrant compelled him to do so." (20 N.Y. 2d, *supra*, at p. 364, 283 N.Y.S. 2d, at p. 28, 229 N.E. 2d, at p. 598.)

Following our decision, the Supreme Court decided Bumper v. North Carolina (391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797). Thereafter, a petition for certiorari was filed in the Supreme Court of the United States where, on October 28, 1968, the court granted the writ in a *Per Curiam* opinion, vacated the judgment and remanded this case for further consideration in light of the *Bumper* decision. (393 U.S. 85, 89 S.Ct. 252, 21 L.Ed. 2d 218.)

We are of the opinion that our initial decision, holding that the defendant is not entitled to suppress the cigarettes,

was proper when rendered and is unaltered by the spirit, if not the language of Bumper v. North Carolina (*supra*).

The facts in *Bumper* illustrate the true meaning of what was written therein. In *Bumper*, an elderly Negro woman, living in a house located in a rural area at the end of an isolated mile-long dirt road in North Carolina, was confronted by four white law enforcement officials—the County Sheriff, two deputies and a State investigator—who claimed the right to enter her premises pursuant to a search warrant. The 66-year-old woman did not attempt to prevent them, as she meekly replied "Go ahead". In that case, as in the present situation, the prosecutor later attempted to sustain the search on the ground of consent. It was also argued that the search was valid because of what was uncovered. (391 U.S., *supra*, at p. 548, n. 10, 88 S.Ct. 1788.) The Supreme Court rejected both arguments. In refusing to find a consent to the search, the court recited in detail the factual setting of the case and then declared that "When a law enforcement officer claims authority to search a home under a warrant, he announces that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." (391 U.S., *supra*, at p. 550, 88 S.Ct., at p. 1792.) As we indicated before, it is undisputed that these words, as presented in *Bumper*, seem applicable and thus determinative here.

A close analysis of the facts in this case, however, discloses that there is lacking here even the "lawful coercion" which was found objectionable in *Bumper*. In the City of Mount Vernon, title to all school buildings and properties is in the Board of Education. The administrators of the various schools operate them as representatives of the owner. Dr. Panitz, an experienced administrator and educator, is that representative in the Mount Vernon High School. Under his direction and supervision, desks and lockers are assigned to students for their use, under predetermined conditions, one of which prohibits the storage of material which violates the law. In this case, the detectives approached him and requested his permission to speak with the defendant. With his assistance,

they first questioned the defendant and after the colloquy described above—wherein the defendant indicated that there was marijuana in his locker—Dr. Panitz opened the defendant's locker. Were we to apply *Bumper* literally to this situation, we would have to conclude, as the dissenters do, that Dr. Panitz was coerced into opening the locker. Should we do so, I feel we would be extending *Bumper* far beyond its logical applicability.

Dr. Panitz was in charge of the Mount Vernon High School and it was his duty to enforce the rules and regulations which were in existence. As we earlier observed, "this right becomes a duty when suspicion arises." Dr. Panitz expressed his awareness of the duties of his position when he testified that: "Being responsible for the order, assignment, and maintenance of the physical facilities, if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker." As the designated representative of the people of Mount Vernon, Dr. Panitz opened the locker, which was certainly not the private property of the defendant, in fulfillment of the trust and responsibility given him by the city residents through the Board of Education. Coercion is absent in this setting, having been displaced by the performance of a delegated duty. While we did state in our prior opinion that Dr. Panitz was empowered to consent to the search, in retrospect, it should be noted that this consent was equated to a nondelegable duty, which had to be performed to sustain the public trust. Contrasting the facts in this case with those in *Bumper*, it does not require extensive analysis to conclude that the "situation instinct with coercion" which characterized the plight of Bumper's 66-year-old grandmother cannot be discerned where we find a public official performing a delegated duty by permitting an inspection of public property. In sum, the factual disparities render the decision in *Bumper* inapplicable.

Accordingly, upon reargument, we should adhere to this court's original decision of July 7, 1967 reversing the order of Appellate Terms.

BERGAN, JUDGE (dissenting).

The police presented to Dr. Panitz, the school vice-principal, a search warrant. The People concede it was a bad warrant. Possessed of the warrant they searched a locker which defendant had rented and which had been assigned personally to him.

The court is again holding, as it did when the case was here before (20 N.Y. 2d 360, 283 N.Y.S. 2d 22, 229 N.E. 2d 596), that, notwithstanding the purported authority of a bad search warrant, the search of defendant's locker was good because the principal who had general control of the school premises "consented" to the search.

No matter how the record is read, the coercive effect of this bad search warrant on the principal as well as on the defendant is inescapable. Dr. Panitz himself testified that in permitting the search of defendant's locker he was "honoring the search warrant" (*supra*, p. 364, 283 N.Y.S. 2d 22, 229 N.E. 2d 596).

There can be no doubt, therefore, that this was a search "in reliance upon a warrant" within the language of Bumper v. North Carolina (391 U.S. 543, 549, 88 S.Ct. 1788, 20 L.Ed. 2d 797). It must equally be said of this present situation, as it was said in *Bumper*, that "the situation is instinct with coercion" (p. 550, 88 S.Ct. p. 1792).

This means that if the bad search warrant played an effective role in the invasion of defendant's privacy, the result is unlawful even though the vice-principal also gave his "consent" to the search and had a general authority in the school premises.

Mrs. Leath gave her consent to the search of her own house in *Bumper*, as the Supreme Court of North Carolina found (State v. Bumpers, 270 N.C. 521, 155 S.E. 2d 173), but this was not permitted to cover in the coercive effect of a bad search warrant which played a part in the resulting "consent".

Even if, on our own independent evaluation of *Bumper*, we might think it quite distinguishable from the present

problem, there can be no doubt that the Supreme Court saw an analogy between the cases because, in vacating the judgment of the Appellate Term entered on the remission from this court (20 N.Y. 2d, *supra*, p. 364, 283 N.Y.S. 2d, p. 29, 229 N.E. 2d, p. 398), it remanded the case back to New York "for further consideration in the light of" its *Bumper* decision (Overton v. New York, 393 U.S. 85, 89 S.Ct. 252, 21 L.Ed. 2d 218).

We are bound to respect this remand. Our reconsideration should be something more than a reiterated statement of our previous ground of decision and a categorical rejection of the binding relevancy of *Bumper*.

The order should be affirmed.

SCILEPPI, KEATING and JASEN, JJ., concur with BURKE, J.

BERGAN, J., dissents and votes to affirm in a separate opinion in which FULD, C.J., concurs.

BREITEL, J., dissents and votes to affirm solely on constraint of *Bumper v. North Carolina* (391 U.S. 543) . . .

Overton v. New York, 393 U.S. 85 (1968)

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment of the Appellate Term of the Supreme Court of New York is vacated, and the case is remanded for further consideration in the light of *Bumper v. North Carolina*, 391 U.S. 543 (1968).

MR. JUSTICE BLACK dissents and would affirm the judgment of conviction here.

People v. Overton, 20 N.Y. 2d 360, 229 N.E. 2d 596, 283 N.Y.S. 2d 22 (1967)

KEATING, JUDGE.

Three detectives of the Mount Vernon Police Department having obtained a search warrant went to the Mount Vernon High School. The warrant directed a search of the persons of two students and, also, of their lockers.

The detectives presented the warrant to the vice-principal, Dr. Panitz, who sent for the two students, one of whom was the defendant, Carlos Overton. The detectives searched them and found nothing. A subsequent search of Overton's locker, however, revealed four marijuana cigarettes.

The defendant moved to invalidate that portion of the search warrant which directed a search of his locker, on the ground that the papers were defective upon which it was based. This motion was granted. The court denied the motion to suppress, however, on the grounds that the vice-principal had consented to the search and that he had a right to do so. The Appellate Term reversed and dismissed the information, holding that the consent of the vice-principal could not justify an otherwise illegal search. The People have appealed from this order of the Appellate Term.

It is axiomatic that the protection of the Fourth Amendment is not restricted to dwellings (Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374). A depository such as a locker or even a desk is safeguarded from unreasonable searches for evidence of a crime (United States v. Blok, 88 U.S. App. D.C. 326, 188 F. 2d 1019).

There are situations, however, where someone other than the defendant in possession of a depository may consent to what otherwise would have been an illegal search. Such a case was United States v. Botsch, 364 F. 2d 542 [2d Cir., 1966], cert. den. 386 U.S. 937, 87 S.Ct. 959, 17 L.Ed. 2d 810. In that case, the defendant had rented a shed from one Stein. Stein retained a key to the shed and accepted deliveries on behalf of the defendant. When the police approached Stein and informed him of their suspicion that the defendant was

receiving goods obtained through fraud, Stein consented to a search of the shed.

In upholding the search, the court noted two significant factors. First, Stein had a key to the shed and, second, more than a mere landlord-tenant relationship existed, since Stein was empowered to take deliveries on behalf of the defendant. The court also noted that Stein had a right to exculpate himself from implication in the defendant's scheme.

Considering all these factors cumulatively, the court concluded that, in this situation, Stein could give consent to the search. Thus, the search was not unreasonable in contravention of the Fourth Amendment.

Dr. Panitz, in this case, gave his consent to the search of Overton's locker. The dissenting opinion suggests, however, that Dr. Panitz' consent was not freely given, because he acted under compulsion of the invalid search warrant. If this were the case, his consent might be rendered somewhat questionable. However, Dr. Panitz testified that: "Being responsible for the order, assignment and maintenance of the physical facilities, if *any* report were given to me by *anyone* of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker." (Italics supplied.)

This testimony demonstrates beyond doubt that Dr. Panitz would have consented as he did regardless of the presence of the invalid search warrant.

The power of Dr. Panitz to give his consent to this search arises out of the distinct relationship between school authorities and students.

The school authorities have an obligation to maintain discipline over the students. It is recognized that when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.

It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to antisocial behavior, such as the use of illegal drugs. The susceptibility to suggestion of students of high school age increases the danger. Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated.

When Overton was assigned his locker, he, like all the other students at Mount Vernon High School, gave the combination to his home room teacher who, in turn, returned it to an office where it was kept on file. The students at Mount Vernon are well aware that the school authorities possess the combinations of their lockers. It appears understood that the lock and the combination are provided in order that each student may have exclusive possession of the locker vis-a-vis other students, but the student does not have such exclusivity over the locker as against the school authorities. In fact, the school issues regulations regarding what may and may not be kept in the lockers and presumably can spot check to insure compliance. The vice-principal testified that he had, on occasion, inspected the lockers of students.

Indeed, it is doubtful if a school would be properly discharging its duty of supervision over the students, if it failed to retain control over the lockers. Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. When Dr. Panitz learned of the detectives' suspicion, he was obligated to inspect the locker. This interest, together with the nonexclusive nature of the locker, empowered him to consent to the search by the officers.

Accordingly, the order of the Appellate Term should be reversed and the matter remitted to that court for consideration of the other points raised by the defendant which were not decided on the prior appeal.

BERGAN, JUDGE (dissenting).

The District Attorney concedes the search warrant was bad, i.e., "We acknowledge, to take as many issues out of the case as possible, that the search warrant was properly vacated." Defendant had paid for personal use of the locker and, as far as he was concerned the People also admit, a search of the locker by police without a warrant "would be invalid."

No doubt the principal of the school had a supervisory power to inspect the locker. But if an invalid warrant was used to compel him to exercise this power, and if it adversely affected the constitutional right of the defendant to be secure against unlawful search and seizure, this invalid compulsion under a bad search warrant was as much as invasion of defendant's rights as if the police, under the purported authority of the warrant, had broken the door of the locker or compelled the defendant himself to open it.

There can be no doubt, reading this record, that the principal opened the door, not because he was exercising a free supervisory control over the locker in the interest of the school program, but because he felt the invalid search warrant compelled him to do so. He affirmatively answered the question that in opening the door he was "honoring the search warrant".

Nor does United States v. Botsch, 2 Cir., 364 F. 2d 542 support the People in this case. There, the owner of a rented shed, having a key and requested by the tenant to deposit certain deliveries of goods in the shed, became concerned about his own involvement in a crime, and invited postal inspectors, without a warrant, to come into the premises. This has no relevance to the effect of compulsion exerted by an invalid warrant on the rights of a person affected by such compulsion.

VAN VOORHIS, BURKE, SCILEPPI and BREITEL, JJ., concur with KEATING, J.

BERGAN, J., dissents and votes to affirm in an opinion in which FULD, C.J., concurs.

Order of Appellate Term reversed and matter remitted to that court for further proceedings in accordance with the opinion herein.

People v. Overton, 51 Misc. 2d 140, 273 N.Y.S. 2d 143 (1966)

PER CURIAM.

Judgment and order denying motion to suppress evidence reversed on the law, motion granted and information dismissed.

The warrant, insofar as it directed a search of defendant's locker in the public high school, was vacated by the trial court. The search was illegal and cannot be justified upon the theory of consent on the part of the vice-principal of said school. Defendant had the exclusive use of the locker in question and the purported consent to search it was not binding upon him. The confession obtained from defendant, being the product of the illegal search and seizure, was inadmissible against him (People v. Rodriguez, 11 N.Y. 2d 279, 286, 229 N.Y.S. 2d 353, 356, 183 N.E. 2d 651, 653). Absent any competent evidence upon which the conviction can be upheld, we are constrained to dismiss the information.

McDONALD and GROAT, JJ., concur.

FANELLI, J., not voting

SUPREME COURT, U. S.

FILED

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 1249

CARLOS OVERTON,

Petitioner,

v.

RAYMOND C. RIEGER, Director of the Department of Probation of the County of Westchester,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Issue Presented

Was the appeal from an order of the United States District Court for the Southern District of New York dismissing a petition for a writ of habeas corpus, properly dismissed by the United States Court of Appeals for the Second Circuit upon jurisdictional grounds?

Statement of the Case

On June 8, 1965, the appellant was adjudicated a Youthful Offender and placed on indefinite probation. (Court of Special Sessions of the City of Mount Vernon, New York, Honorable John P. Griffith.) He then appealed that adjudication to the Appellate Term of the Supreme Court of the State of New York, which reversed (51 Misc. 2d 140 [1966], Appendix, p. 32). The People then appealed to the New York Court of Appeals, which reversed the Appellate

Term (20 N. Y. 2d 360 [1967], Appendix, p. 28). On remand, the Appellate Term affirmed without opinion. On petition for a writ of certiorari, this Court vacated that judgment and remanded for further consideration (393 U. S. 85 [1968], Appendix, p. 27). A petition for rehearing was denied (393 U. S. 992 [1968]), and on remand, the New York Court of Appeals upon reconsideration, adhered to its original decision (24 N. Y. 2d 522 [1969], Appendix, p. 22). No petition for a writ of certiorari was filed.

On September 12, 1969, the appellant filed a petition in the United States District Court for the Southern District of New York, for a writ of habeas corpus (69 Civ. 4006). The denial of that petition on April 6, 1970, by Honorable Irving Ben Cooper (311 F. S. 1035 [1970], Appendix, p. 16) was appealed to the United States Court of Appeals for the Second Circuit. Respondent's motion to dismiss was granted by order of the Court dated September 28, 1970 (Appendix, p. 14). The petitioner's application for rehearing was denied by order of the Court dated October 21, 1970 (Appendix, p. 15).

The instant petition should be denied as moot

The instant petition should be denied as moot as the petitioner was not in custody when the petition for a writ of habeas corpus was filed, and is not now in custody.[1] There was and is no detention, the legality of which could be considered on a writ of habeas corpus, and therefore, a writ cannot issue (28 U.S.C. 2241).

> "The federal habeas corpus statute requires that *the applicant must be 'in custody' when the application for habeas corpus is filed.* This is required not only by the repeated references in the statute, but also by the history of the great writ. Its province, shaped to guarantee the most fundamental of all rights, is to

[1] It is conceded that, for the purpose of petitioning for a writ of habeas corpus in the Federal Courts, a person who is actually on probation is in custody within the meaning of 28 U.S.C. 2241.

provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." (Emphasis supplied.)

Carafas v. *La Vallee*, 391 U. S. 234 (1968).

"It is well settled that this court will not proceed to adjudication where there is no subject matter on which the judgment of the court can operate. And although this application has not as yet reached that stage, still as it is obvious that before a return to the writ can be made, or any other action can be taken, the restraint of which petitioner complains would have terminated, we are constrained to decline to grant leave to file the petition."

Ex parte Baez, 177 U. S. 378 (1900).

The fact that a Court may grant relief other than discharge from custody following the issuance of a writ of habeas corpus, has led to the determination that provided the petitioner was in custody at the time the writ was sought, subsequent discharge pending appeal would not necessarily render the issue moot (*Carafas* v. *La Vallee*, *supra*). The issue may not, however, be moot at the time the relief is sought and then, because an appeal is taken, gain life. In the instant case the issue was moot when the petition was filed in the District Court as the petitioner was not then in custody, and is now moot as he is not now in custody.[2]

The *Carafas* Court then found that a petitioner who had petitioned for a writ of habeas corpus while he was in custody would be entitled to appellate review as he still had a "substantial stake in the judgment of conviction which

[2] The petitioner is not in custody as a result of adjudication upon which he sought a writ of habeas corpus. On September 2, 1970, the petitioner was certified as a narcotic addict under § 210 of the Mental Hygiene Law (by the County Court) as the result of totally unrelated charges and committed to the care and custody of the Narcotic Addiction Control Commission for a period of up to 36 months.

survives the satisfaction of the sentence imposed on him," in that the "disabilities or burdens (which) may flow from petitioner's conviction" continue for the rest of his life. The petitioner is suffering from no "disabilities or burdens" as a result of his adjudication and has not been "convicted."

> "No determination made under the provisions of this title shall operate as a disqualification of any youth subsequently to hold public office, public employment, or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no youth shall be denominated a criminal by reason of such determination, nor shall such determination be deemed a conviction." (Section 913n New York Code of Criminal Procedure)[4]

The instant petition should be denied as moot, as the petitioner was not in custody when the petition for a writ of habeas corpus was filed and is not now in custody and further because his adjudication did not result in a "conviction" nor is he suffering from any "disabilities or burdens."

The petitioner was not in custody when the petition for a writ of habeas corpus was filed on September 12, 1969.

On June 8, 1965, the petitioner was adjudicated a Youthful Offender and placed on indefinite probation. The maximum period of probation and hence custody was three years.

> "*The defendant may be placed on probation for a period not to exceed three years*, provided, however, that the Court in its discretion may from time to time, while such probation is in force, extend such probation for a period not to exceed five years, including the

[4] All references to the New York Law are to the law as it existed at the time of adjudication, unless otherwise noted.

original probationary period." (Emphasis supplied.) (Section 913m, New York Code of Criminal Procedure.)

The indefinite period of probation imposed, expired at the end of the three-year maximum and as it had not been extended prior to that time, could not thereafter be extended (913m, New York Code of Criminal Procedure). The period of probation commenced to run on June 8, 1965, and continued to May 20, 1966 when the adjudication was reversed by the Appellate Term. The period then commenced to run anew on July 7, 1967, when the Court of Appeals reversed the decision of the Appellate Term. This Court subsequently vacated the decision of the Appellate Term and remanded the matter for further consideration, but did not vacate the adjudication by the Mount Vernon Court. Hence, the period of probation continued to run from the reversal by the New York Court of Appeals until its maximum expiration on July 26, 1969.

The maximum period of probation having automatically expired at the end of three years, namely, on July 26, 1969, forty-eight days prior to the filing of the petition in the District Court on September 12, 1969, the petitioner was not in custody as required by 28 U.S.C. 2241, and hence the District Court lacked jurisdiction to issue a writ of habeas corpus.

The indefinite period of probation was further limited to the petitioner's twenty-first birthday, which was October 8, 1968.

> "*The period of probation may not in the case of a child extend beyond his minority.*" (Emphasis supplied.) Section 933, New York Code of Criminal Procedure.[4]

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[4] Repealed Laws of New York 1967, Chapter 681. Such repeal does not affect the petitioner as to do so would amount to an *ex post facto* law in violation of the Constitution of the United States.

It is obvious therefore, that, under the New York law, the period of probation imposed upon the adjudication of the petitioner as a Youthful Offender, and hence custody, expired at the expiration of three years or on his twenty-first birthday, whichever occurred first. As the petitioner's twenty-first birthday was on October 8, 1968, three hundred and thirty-nine days before the petition for a writ of habeas corpus was filed in the District Court, the petitioner was not in custody as required by 28 U.S.C. 2241, and a writ of habeas corpus could not issue.

Petitioner waived federal review

The petitioner urges that he should not be denied federal review because it took so long to exhaust his state remedies. That contention is utterly without merit, as the only right to federal review open to a defendant is by way of petition for a writ of certiorari after affirmance by the State Courts. Such was voluntarily waived by the petitioner who was fully aware of that avenue of pursuit.

On April 23, 1969, the decision of the New York Court of Appeals ended the appellate course of the original adjudication in the State Court. At that time the petitioner had ninety days[5] or until July 22, 1969 to petition the United States Supreme Court for a writ of certiorari (U. S. Sup. Ct. Rule 22, 28 U.S.C.). It cannot be alleged that the petitioner was not aware of this course of action as on June 19, 1968 a prior petition for a writ of certiorari was docketed in this Court (*Overton* v. *New York*, 393 U. S. 85 [1968]).

The petitioner chose not to seek review of his adjudication by this Court until September 12, 1969, fifty-two days after his time to do so expired. The appellant, in a belated attempt to obtain review by this Court, then attempted to do indirectly that which he could not do di-

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[5] An application for an additional 60 days could have been made within that period (U. S. Sup. Ct. Rule 34, 28 U.S.C.).

rectly, and filed a petition for a writ of habeas corpus in the District Court, even though he was not in custody and that Court therefore lacked jurisdiction.

The District Court lacked jurisdiction to entertain the petition for a writ of habeas corpus and the appeal was therefore properly dismissed.

The petitioner was not in custody, as required by 28 U.S.C. 2241, when he filed the petition for a writ of habeas corpus in the District Court, and hence that Court lacked jurisdiction to consider the petition on the merits. The Circuit Court of Appeals was limited in the first instance to a review of the exercise of that jurisdiction by the District Court and properly determined that such was improperly invoked.

The petitioner indicates that such issue was not properly raised by the respondent, however, whether it was or not is immaterial as the Circuit Court of Appeals had the duty to notice the defect and dismiss.

> "The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the District Court should, therefore, have declined sua sponte, to proceed in the cause. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit. The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill."

United States v. *Corrick*, 298 U. S. 435 (1936).

> "Unlike an objection to venue lack of Federal jurisdiction cannot be waived or be overcome by an agree-

ment of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."

Mitchell v. *Maurer*, 293 U. S. 237 (1934).

"The threshold question is whether the District Court had jurisdiction of the matter at issue, if jurisdiction is lacking, the power of this Court is limited to correcting the error of the District Court in entertaining jurisdiction."

Transport Manufacturing and Equipment Company of Delaware v. *Trainor*, 382 F. 2d 739 (1967).

A writ of habeas corpus may not extend to a person unless he is in custody at the time of the filing of the petition (28 U. S. 2241, *Carafas* v. *La Vallee, supra*). In the instant case it is clear that the petitioner was not in custody at the time he filed the petition for a writ of habeas corpus in the District Court. As the District Court lacked jurisdiction to entertain the petition, the attempt to do so was properly corrected by the Circuit Court of Appeals when it dismissed the appeal.

CONCLUSION

The instant petition for a writ of certiorari should be denied.

Respectfully submitted,

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